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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-309

TOUCHE ROSS & CO.,

Petitioner,

–against–

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Petitioner Touche Ross submits this brief in reply to certain contentions first raised in the opposing briefs filed by the Trustee and SIPC.[1] As demonstrated in this reply brief, and contrary to the assertions of the Trustee and SIPC, (i) review of the decision of the Court of Appeals majority would not be "premature", (ii) the broad grant of jurisdiction in Section 27 of the 1934 Act does not abrogate the limitations expressly set forth in Section 18(a) thereof on private remedies for violations of the

[1] In accordance with this Court's Rule 24(4), this reply brief does not address or attempt to refute contentions the erroneous nature of which already is demonstrated in the Petition, or which are plainly insubstantial.

reporting provisions such as Section 17(a), (iii) the effort by the Trustee and SIPC to explain away the principle of the Third Circuit's conflicting holding in *In re Penn Central Securities Litigation* as restricted only to Section 13(a) cases misapprehends that the purpose of Section 18(a) is to delimit the scope of liability for misstatements in all reports required by the 1934 Act, and (iv) the class of plaintiffs who may seek to invoke the Section 17(a) remedy created by the Court of Appeals majority is not limited to SIPC and a small number of customers.

I

Review Of The Decision Of The Court Of Appeals Majority Would Not Be "Premature"

1. Review by this Court of the decision of the Court of Appeals majority would not require, as SIPC contends (SIPC Br. 11), this Court to "make an abstract legal determination in an evidentiary vacuum". This case is not like those in which this Court is asked to delineate the outer contours of an already well-recognized right of action, and in which a detailed evidentiary record would be useful and in many instances even necessary; moreover, it does not involve any question of proper application of recognized principles to the particular facts. Rather, it involves novel and important, but strictly legal, questions of statutory construction, *viz.*, whether Section 17(a) of the 1934 Act creates an implied private right of action in addition to the express remedy provided by Section 18(a) and, if so, who may maintain such implied right of action. No detailed evidentiary record is necessary or in any significant sense even useful to resolve those questions properly. The factual allegations of the complaint (reproduced in full in the appendix to SIPC's brief) are admitted for purposes of the Petition, and provide a more than ample factual basis

for this Court's decision.[2] As shown in the Petition (p. 34 n. 20), there is substantial precedent in this Court's decisions for reviewing a decision which, like that of the Court of Appeals majority here, raises at this procedural stage clear-cut threshhold issues of law which are important to the administration of the federal securities laws and which are fundamental to—if not determinative of—the further conduct of the action. Indeed, even in a case where the issue was the outer contours of an already well-recognized right of action under the federal securities laws, this Court only recently found that the allegations of the complaint provided a sufficient factual context, and granted certiorari at precisely the same procedural stage as here. *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977).

2. The purported possibility referred to by SIPC (SIPC Br. 11) that proceedings on remand may "terminate this action in the federal courts and thereby . . . obviate the need for review by this Court" not only does not make review by this Court at this stage inappropriate, but actually calls attention to the fact that such review is important—indeed, may present the only opportunity for this Court—to determine the extent to which plaintiffs may "federalize" what are essentially common law claims by the simple expedient of characterizing the conduct complained of as a violation of the federal securities laws. SIPC emphasizes, as one of the issues determination of which on remand may "terminate" this action, the question left by the Court of

[2] Since all the factual allegations are admitted for purposes of the Petition, there is no need, as SIPC contends, for "discovery" with respect to "such vital factual matters" (SIPC Br. 11). Moreover, there simply is no possibility that the Trustee or SIPC can "discover" any fact not alleged in the complaint which can have any bearing on the questions of law raised by the Petition.

Appeals majority for the District Court "whether to exercise pendent jurisdiction over the plaintiffs' common law claims" (SIPC Br. 11-12). The Trustee also stresses the significance of the common law claims, pointing to the existence of "other, more substantial monetary claims asserted by the Trustee as successor to Weis for negligence, breach of contract and the like", which arise "under state and common law based on the same facts as his Section 17 claim", and because of which "in this very case, the Section 17 issue may have only an illusory importance" (Trustee Br. 6, 14). Such emphasis by both SIPC and the Trustee on their common law claims indicates that they are using their ostensible claims under Section 17(a) merely as a pretext to get their common law claims into a federal courthouse, and that it is the common law claims which will be at the focus of the pre-trial proceedings and the trial. In such circumstances, despite the investment of federal judicial resources on the premise that the case involves a claim under the federal securities laws, the ultimate judgment very well may be grounded on state law. *Cf. Van Gemert* v. *Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975). If Touche Ross were to prevail, the use by the Trustee and SIPC of their Section 17(a) claims only as a pretext for litigating the common law claims in federal court would escape review here; significantly, even if the Trustee or SIPC were to prevail, the same probably would be true. *Cf. Rosado* v. *Wyman*, 397 U.S. 397, 403-405 (1970); *Kavit* v. *A. L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974). *See also Bell* v. *Hood*, 327 U.S. 678, 686 (1946) (Stone, Ch. J., dissenting). Thus, rather than being "premature", the Petition may present the only effective opportunity for this Court to review the important issues raised thereby.

II

The "Broad" Jurisdictional Grant In Section 27 Of The 1934 Act Does Not Abrogate The Limitations Set Forth In Section 18(a) On Private Remedies For Violations Of The Reporting Provisions

1. Pointing out that Section 27 of the 1934 Act "broadly grants" to the district courts jurisdiction of "all suits . . . and actions . . . brought to enforce any liability created by" the 1934 Act, SIPC argues that Section 27 "permits any protected person to enforce, through the federal courts, any liability or duty created by the 1934 Act and the regulations thereunder", and that, since it and the Trustee invoke Section 27 jurisdiction, the limitations in Section 18(a) on the express private remedy for reporting violations are to be disregarded here (SIPC Br. 3-4, 22). SIPC's argument is erroneous because even its most heavily relied upon cases do not hold, as SIPC would have it, that by virtue of Section 27 *all* provisions of the 1934 Act *per se* give rise to implied private rights of action to redress violations thereof. For example, even in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964) (SIPC Br. 17-19, 22), which did rely on Section 27, this Court stated that an implied right of action was available because it was "necessary" in order to achieve the purposes of Section 14(a). Similarly, this Court recently stated in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 25 (1977) (SIPC Br. 16-18), that its decisions hold only "that *in some circumstances* a private cause of action can be implied with respect to the 1934 Act's antifraud provisions, even though the relevant provisions are silent as to remedies", *viz.*, only in circumstances "where congressional purposes are likely to be undermined absent private enforcement" (emphasis added). *Accord, Santa Fe Industries, Inc.* v. *Green*,

supra, 430 U.S. at 477 ("a private cause of action . . . should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' "); *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49, 62-63 (1975); *cf. Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 402, 406 (1971) (Harlan, J., concurring).[3]

2. Since Section 27 does not have the effect which SIPC would ascribe to it, the fact that Section 27 is broader then the jurisdictional provision involved in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974) ("*Amtrak*"), does not, as SIPC argues (SIPC Br. 22), serve to distinguish *Amtrak* and its controlling impact here. This Court made clear in *Amtrak* that, although that case did involve a limited jurisdictional provision, the legislative history demonstrated a Congressional purpose thereby to authorize only a limited class of suits, *id.* at 457; therefore the analog here of the *Amtrak* provision is Section 18(a) (which likewise reflects a Congressional intent to permit only a limited class of actions for reporting violations) and not, as SIPC contends, Section 27.[4]

3. SIPC similarly errs in attempting to distinguish *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) (SIPC Br. 22). Indeed, SIPC itself emphasizes (SIPC Br. 24) that SIPA, which was the statute involved in *Barbour,* expressly provides in Section 2, 15 U.S.C. § 78bbb, that it is to be construed as an amendment to, and as if it were included as a section of, the 1934 Act. Therefore, Section 27 presumably is as applicable to SIPA as it is to Section 17(a), and cannot serve to distinguish *Barbour,* where, despite such applicability of Section 27, this Court held that, in light of SIPA's limited express remedy, no private right of action could be implied to enforce SIPA's provisions.

[3]SIPC cannot avoid the true thrust of those cases by talking in generalities about "statutory tort" (SIPC Br. 19), or by citation to such cases as *Bell* v. *Hood, supra,* which is inapplicable here since it held only that jurisdiction existed to determine *whether* a federal cause of action existed.

[4]SIPC errs in stating that "in *Amtrak* the right to enforce the statute was lodged exclusively with the Attorney General" (SIPC Br. 22). The right to seek enforcement also was granted to a class of private plaintiffs, *viz.,* employees adversely affected by a labor agreement and their representatives. 414 U.S. at 456-457, 460.

4. SIPC also unpersuasively attempts to distinguish *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), which in the specific context of the 1934 Act applied the principle, recognized in *Amtrak* and *Barbour,* that it is improper to imply a remedy which would be broader than the express statutory remedy specifically provided for violation of a statute (SIPC Br. 21-22). SIPC misconstrues, and therefore misapplies here, this Court's statement in *Blue Chip Stamps* that it would be "anomalous" to expand the plaintiff class for a judicially implied cause of action beyond the bounds delineated by Congress "for *comparable* express causes of action" (emphasis added by SIPC). *Blue Chip Stamps* did not, as SIPC circularly argues, find Sections 10(b) and 18(a) to be "comparable" because both were intended to provide a means of protection to purchasers or sellers exclusively, for the very issue to be decided in *Blue Chip Stamps* was whether Section 10(b) did apply only to purchasers or sellers. Rather, Sections 10(b) and 18(a) were found to be "comparable" because they dealt with similar subject matter, and that finding was the premise for this Court's conclusion that the express purchaser-seller requirement of Section 18(a) must also

apply to implied rights of action under Section 10(b). To imply a right of action under Section 17(a) broader than the express remedy under Section 18(a) would be even *more* "anomalous" than to imply such a broader right under Section 10(b). The express Section 18(a) remedy deals not with circumstances which are simply "comparable" to those dealt with by Section 17(a); it deals with precisely the same circumstances, *viz.*, misstatements in reports required to be filed under Section 17(a). Consequently, the *Blue Chip Stamps* principle is not distinguishable and precludes the right of action under Section 17(a) implied by the Court of Appeals majority.[5]

5. SIPC argues incorrectly that the decision of the Court of Appeals majority is supported by the principle that federal securities legislation is "fundamentally remedial in nature" and "is not to be construed 'technically and restrictively, but flexibly to effectuate its remedial purposes' " (SIPC Br. 19, 22 fn.). In holding in

[5]In addition to relying upon Section 27 as a basis for simply ignoring the express remedy provisions of Section 18(a) and the principles of statutory construction which *Amtrak*, *Barbour* and *Blue Chip Stamps* require to be applied, SIPC seeks by reference to this Court's recent decision in *Santa Clara Pueblo* v. *Martinez*, 98 S. Ct. 1670 (1978), to support the use by the Court of Appeals majority, without reference to Section 18(a), of the factors set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975) (SIPC Br. 20 fn.). SIPC's reliance on *Santa Clara Pueblo* is misplaced because (i) the statute there involved did not expressly provide *any* civil right of action, and only provided habeas corpus in situations involving confinement; and (ii) nonetheless, this Court, citing *Amtrak*, held that no implied remedy was available since "the structure of the statutory scheme and the legislative history . . . suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one". 98 S.Ct. at 1679.

Equally unpersuasive is SIPC's argument that recognition of Section 18(a) as an exclusive remedy provision would impermissibly "abrogate" Section 27 because it would amount to a "repeal by implication" thereof (SIPC Br. 22-23 2d fn.). As shown above, Section 27 simply grants jurisdiction; it does not create a right of action for all violations of the 1934 Act. Moreover, since Sections 18(a) and 27 were contemporaneously enacted, the concept of "repeal" is totally inapposite.

Blue Chip Stamps that the purchaser-seller requirement expressed in Section 18(a) is applicable to implied rights of action under Section 10(b) and Rule 10b-5, this Court rejected the view that such requirement is inconsistent with the principle upon which SIPC relies, concluding that "[h]owever *flexibly* we may construe the language of both provisions, nothing in such construction militates against the *Birnbaum* [purchaser-seller] rule" (emphasis added). 421 U.S. at 748-749. Moreover, in its recent decision in *Securities & Exchange Commission* v. *Sloan*, 98 S. Ct. 1702, 1710-1711 (1978), this Court emphasized that reference to the "remedial purposes" of the 1934 Act did not justify reading a particular provision "more broadly than its language and the statutory scheme reasonably permit", even assuming that as a result a "totally satisfactory remedy" would not be available "in every instance in which the [SEC] would like such a remedy".

III

In Erroneously Arguing That The Principle Of The Third Circuit's Decision In *In Re Penn Central Securities Litigation* Does Not Conflict With The Decision Of The Court Of Appeals Majority, SIPC Misapprehends The Purpose Of Section 18(a)

1. The Petition demonstrates (pp. 23-25) that the decision of the Court of Appeals majority implying a private right of action under Section 17(a) conflicts in principle with the decision of the Third Circuit in *In re Penn Central Securities Litigation*,[6] as well as with a substantial number of district court decisions, involving other reporting provisions of the 1934 Act. SIPC would erroneously distinguish the Third Circuit decision on the

[6]347 F.Supp. 1327 (E.D. Pa. 1972), *decision as to Section 13(a) adhered to on reargument*, 357 F.Supp. 869 (E.D. Pa. 1973), *aff'd*, 494 F.2d 528 (3d Cir. 1974).

ground that it "*held* only that Section 18(a) is the exclusive remedy for a violation of Section 13(a)" (SIPC Br. 14), a distinction which, as the District Court here recognized (50a; 428 F.Supp. at 489-490), is much too narrow and misses the pertinent point, *viz.*, that the Third Circuit's decision, and the district court decisions, all recognize, in holding that Section 13(a) and other reporting provisions do not create any implied private remedies, that Section 18(a) provides the exclusive remedy for *all* of the reporting provisions of the 1934 Act, including Section 17(a).

2. SIPC totally misconstrues the purpose of Section 18(a) when it asserts, in an effort to support its purported distinction of *In re Penn Central Securities Litigation*, that Section 18(a) is "inapplicab[le]" and "cannot be wedded" to Section 17(a) (SIPC Br. 15-16).[7] SIPC errs in those assertions because the language, context and history of Section 18(a)—and the fact that Section 18 is entitled "Liability for Misleading Statements" (instead of, for example, "Rights of Purchasers-Sellers")—plainly demonstrate that the Congressional intention underlying Section 18(a) was not simply to grant a remedy to purchasers and sellers, but to delineate the full scope of liability for misleading statements in filed reports by providing that purchasers and sellers were the only class of persons to whom a remedy for such statements was to be available. *Cf. Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 734 ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had

[7]That Section 18(a) surely is "applicable" to reports filed under Section 17(a) is demonstrated by the fact, which is noted in Judge Mulligan's dissent, "that in another suit arising out of the Weis debacle Judge Wyatt has sustained a section 18(a) claim asserted by a plaintiff bank which allegedly purchased securities of Weis in reliance on the section 17(a) reports involved in this case. *Exchange National Bank* v. *Touche Ross & Co.*, 75 Civ. 916 (S.D.N.Y.)" (26a [n. 5]).

little trouble in doing so expressly"). Indeed, the consistent and predominant pattern of the 1934 Act is to limit private remedies to purchasers and sellers. *Id.* at 735-736 ("The principal express nonderivative private civil remedies . . . are by their terms expressly limited to purchasers or sellers of securities").

3. Moreover, as the Petition demonstrates (pp. 19-20), SIPC's position is not advanced even by assuming for purposes of argument the correctness of its contention that Section 18(a) was intended only to protect purchasers and sellers and that Section 17(a) was intended to protect brokerage firm customers. SIPC's contention merely serves to emphasize that Congress' express provision in Section 18(a) of a remedy in favor of purchasers and sellers, and Congress' contemporaneous refusal to provide an express remedy to brokerage firm customers, necessarily reflect a Congressional intention that the customers *not* have any remedy, express or implied, under Section 17(a). *See also Amtrak, supra*, 414 U.S. at 457 (rejecting contention, based upon *Borak*, that a right of action under the Amtrak Act should be implied in favor of an association of railroad passengers because "railroad passengers are the intended beneficiaries of the Act").

IV

The Class Of Plaintiffs Who May Seek To Invoke The Implied Section 17(a) Remedy Created By The Court Of Appeals Majority Is Not Limited To SIPC And A Small Number Of Customers

The Trustee and SIPC seek to minimize the obviously substantial impact, in terms of increased federal caseloads, of the creation of an implied Section 17(a)

remedy (see Petition 29-33), by arguing that the class of plaintiffs who may seek to invoke an implied remedy under Section 17(a) is limited to SIPC and a small number of customers whose claims for the net equity in their accounts exceed the recently increased maximum amounts of protection provided under SIPA (Trustee Br. 11-14; SIPC Br. 13). However, that argument, among other reasons for being erroneous, improperly *assumes* that customers whose net equity claims do not exceed the SIPA limits, and whose claims therefore are "fully" satisfied to the extent of their net equity as computed pursuant to the formulae set forth in SIPA, do not have any damages the recovery of which they may seek under Section 17(a). Such an assumption is in fact inconsistent with the decision of the Second Circuit itself in another case arising out of the Weis debacle, *Rich* v. *New York Stock Exchange,* 522 F.2d 153 (2d Cir. 1975) (action under Section 6 of the 1934 Act), that brokerage firm customers who ostensibly have been compensated "fully" under SIPA nevertheless may be able to prove and recover *other* types of damages which arise from a brokerage firm liquidation but for which no compensation is provided under SIPA. Significantly, the Weis customers who already have sued Touche Ross as a result of the decision of the Court of Appeals majority here (see Petition 31) seek, *inter alia,* recovery of precisely the types of damages referred to in *Rich* v. *New York Stock Exchange.* Since *any* customer of a defunct brokerage firm can claim to have suffered such damages, the class of plaintiffs who may seek to invoke an implied Section 17(a) remedy is huge.

CONCLUSION

Touche Ross' Petition for a Writ of Certiorari should be granted.

October 25, 1978.

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